

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB-2690/P2dn
MGD:wlj:mrc

July 9, 1999

Don:

Please review this draft carefully to ensure that it is consistent with your intent. In particular, please note the following:

1. Under the bill, “performance” includes the presentation of non-musical sounds, such as a monologue. Is this okay?

2. The definition of “recording” includes any medium that may be developed in the future on which sounds or images or both are stored and encompasses non-tangible media. Consequently, the draft replaces “article” in s. 943.207 (1) with “recording.” The draft, however, does not clearly indicate how penalties are to be calculated for violations that consist of making available a single unauthorized recording to more than one person — for example, through the Internet. Please let us know how you want the penalties to be structured for such violations.

3. The revisions suggested for s. 943.207 (1) add a requirement that the sale be for commercial advantage or private financial gain. The prosecutor is already obligated under the draft to prove that the person was engaged in certain types of conduct (such as advertising or selling the recording) that, in most cases, would reflect the person’s goal of commercial advantage or private financial gain. Adding this requirement adds another element for a prosecutor to prove. Therefore, you may want to consider removing the “commercial advantage/private financial gain” requirement.

4. Under the bill, a person who transports unauthorized recordings violates ss. 943.207 and 943.208. Based on the suggested language, however, s. 943.209 does not refer to transporting counterfeit recordings. Moreover, a person making the initial recording under ss. 943.207 (1) (a) and 943.208 (1) (a) is only liable if he or she does so with intent to sell it. These provisions do not prohibit a person from making the recording with intent to rent copies (although the person would be subject to prosecution under ss. 943.207 (1) (b) and 943.208 (1) (b) if he or she ultimately rents the recording). Are these distinctions okay?

5. In view of the suggested language, the draft covers, among other things, renting, lending and offering to rent counterfeit recordings (s. 943.209). Sections 943.207 and 943.208 refer to renting pirated and counterfeit recordings, but they do not refer to lending or offering to rent such recordings. It is unclear to me what distinguishes

“lending” from “renting,” particularly in view of the “commercial advantage/private financial gain” language. Aside from that, does the draft reflect your intent in this area?

6. Prosecutors may have difficulty determining the number of recordings involved in offenses predicated on the advertisement of illicit recordings. This makes it unlikely that a person will be charged with anything more than a Class A misdemeanor based on advertising alone.

7. By linking the penalty to the aggregate number of recordings, the bill may be construed as limiting prosecutors’ ability to charge multiple offenses. For example, a person who sells 1,200 pirated copies of recording A and 1,500 pirated copies of recording B in one day may only be charged with a single Class C felony. (At the same time, since the total number of recordings would exceed 100, a person who sells 70 pirated copies of recording C and 60 pirated copies of recording D would be subject to prosecution for a Class D felony -- although prosecutors would retain the discretion to charge the violation as a Class A misdemeanor -- or two (or more) separate Class A misdemeanors, depending on how the 180-day period is measured.)

At the same time, the bill, may be construed as leaving a prosecutor significant discretion in deciding how to charge a person who violates these provisions through different types of conduct. Thus, a person who transports 120 pirated copies of recording Z and sells 110 of them could arguably be charged with two Class D felonies (one based on transporting the recordings, the other based on the sale). Finally, unlike ss. 943.207 and 943.209, the penalty provisions in s. 943.208 treat audiovisual recordings differently from other recordings. A person who sells 95 sound recordings and eight audiovisual recordings during a 180-day period in violation of s. 943.208 may be guilty of a Class D felony (for selling more than 100 but less than 1,000 recordings embodying sound) and a Class A misdemeanor (for selling 10 or fewer audiovisual recordings). If you would like the draft’s treatment of any of these issues to be changed, please let us know.

8. Under s. 973.075, when certain property (such as a vehicle) that is subject to a perfected security interest is forfeited, the proceeds of the forfeiture are to be used to pay the holder of the security interest, provided that the the holder lacked knowledge of the crime. Do you want to include similar provisions in this bill?

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